If prompt enactment of such a statute seems unlikely, however, it becomes all the more important to make full use of existing law to close the tax loophole presented by deferred compensation contracts. The doctrine of constructive receipt, well established in tax law, is perfectly suited to the situation. If it is used, a taxpayer who enters into a deferred compensation agreement will fare no better than his counterpart who purchases insurance out of income actually received.

VARIANCE FROM THE PRETRIAL ORDER*

THE pretrial conference [1] is a new technique [2] designed to minimize the length and cost of litigation by narrowing the issues for trial.[3] The maximum

* Jenkins v. Devine Foods Inc., 3 N. J. 450, 70 A.2d 736 (1950).

1. Pretrial procedure is authorized in twenty-nine states and in federal practice. It is widely used in parts of eleven states, especially in large metropolitan centers such as New York, Boston and Detroit. In New Jersey and about twenty percent of the federal districts all cases are submitted to pretrial conference. AMERICAN BAR ASS'N, SECTION OF JUDICIAL ADMINISTRATION, THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE 48-9 (1950); VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 208 (1949); Pretrial Committee of the Judicial Conference of Senior Circuit Judges, *Use of Pre-Trial Procedure in State Courts*, 4 F.R.D. 99 (1944).

Generally the only ones who participate in the conference are the judge and the attorneys for the parties. *Pre-Trial Procedure in the Wayne County Circuit Court Detroit, Michigan*, SIXTH ANNUAL REPORT OF THE JUDICIAL COUNCIL OF MICHIGAN 61, 63 (1936). Judge Delehant favors the practice, *The Pre-Trial Conference in Practical Employment*, 28 NEB. L. REV. 1, 17 (1948). Judge Fee argues that the parties should be present, *The Lost Horizon in Pleadings Under the Federal Rules of Civil Procedure*, 48 COL. L. REV. 491, 503 (1948). For sample transcripts of pretrial conferences, see *Committee for the Improvement of the Administration of Justice of the American Bar Ass'n*, 4 F.R.D. 35 (1944).

For discussions of pretrial procedure, see generally, *Report of the Committee on Pre-Trial Procedure*, 63 A.B.A. REP. 534 (1938); Ackerson, *Pretrial Conferences and Calendar Control: The Keys to Effective Work in the Trial Courts*, 4 RUT. L. REV. 381 (1950); Gershenson, *Pre-Trial Procedure*, 26 WASH. U.L.Q. 348 (1941); Pike, *Objections to Pleadings Under the New Federal Rules*, 47 YALE L.J. 50, 69 (1937); Sunderland, *The Theory and Practice of Pre-Trial Procedure*, 36 MICH. L. REV. 215 (1937); Comment, *Procedure—The Pretrial Conference*, 38 KY. L.J. 302 (1950).

2. Its earliest use in the United States was in Detroit in 1929. *Pre-Trial Procedure in the Wayne County Circuit Court Detroit, Michigan, supra* note 1, at 64. In 1935 it was adopted by the Superior Court of Suffolk County sitting in Boston. Gray, *Pre-Trial Procedure in Suffolk County*, 107 BOSTON BAR BULL. 5 (1936); *The Massachusetts Pre-Trial and Auditor Systems*, THIRD ANNUAL REPORT OF THE JUDICIAL COUNCIL OF NEW YORK 232 (1937). Los Angeles adopted pretrial procedure in 1937 to help alleviate crowded calendars, *Report of the Committee on Pre-Trial Procedure, supra* note 1 at 544, but it has now fallen into disuse there, AMERICAN BAR ASS'N, SECTION OF JUDICIAL ADMINISTRATION, THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE 45, 48 (1950).

3. The pretrial conference is also used for inducing settlements. Where it is used regularly, approximately 10 to 25 percent of the cases disposed of each year are settled at the pretrial conference. *Pre-Trial Procedure in the Wayne County Circuit Court Detroit, Michigan, supra* note 1, at 73; Comment, *Pre-Trial Hearings and the Assignment of Cases*, 33 ILL. L. REV. 699, 703 (1939).

effectiveness of the procedure requires that the limitations embodied in the resulting pretrial order be strictly enforced at trial.[4] On the other hand, the precise course of a future trial is not easily anticipated. Rigid enforcement of the pretrial order therefore might foreclose unforeseen valid claims and defenses as seriously as the strict pleading rules of a few generations ago. The trial court must reconcile these opposing considerations when a party seeks to introduce an issue not included in the pretrial order. And the appellate court must decide how closely to police the trial court's determination.

Jenkins v. Devine Foods [5] presented the New Jersey Supreme Court with its first opportunity to resolve that problem when a case has been tried at variance with a pretrial order. The action was brought to recover the cash value of two credit memoranda given Jenkins when he returned defective merchandise to defendant. At the pretrial conference, Jenkins claimed that defendant had effectively prevented him from using the memoranda by continuing to send defective merchandise.[6] At trial, plaintiff conceded that defendant had always been willing to deliver satisfactory goods.[7] But Jenkins now based his case on the theory that the agreement authorizing the memoranda entitled him to demand cash and therefore justified his refusal to accept the proffered merchandise. On several occasions defendant protested the litigation of issues not embodied in the pretrial order but it nevertheless contested plaintiff's new theory.[8] The court charged the jury that the only issue before them was whether the memoranda were payable in merchandise or cash, and a verdict was returned for the plaintiff.

On appeal, a divided Supreme Court of New Jersey reversed, holding that a judgment based on a claim outside the pretrial order could not stand. It thus required Jenkins to retry the same claim, after first securing a pretrial order embodying it.[9] The court did not hold that plaintiff's new claim

4. McCarthy v. Lerner Stores Corp., 9 F.R.D. 31 (D. D.C. 1949); Bryant v. Phoenix Bridge Co., 43 F. Supp. 162 (D. Me. 1942); Laws, *Pre-Trial Procedure—A Modern Method of Improving Trials of Law Suits*, 25 N.Y.U.L. Q. REV. 17, 23 (1950) and cases cited.

On the pretrial order see, Commentary, *The Pre-Trial Order*, 4 FED. RULES SERV. 16.3 (1941); Laws, *supra* at 22.

5. 3 N.J. 450, 70 A.2d 736 (1950).

6. This is the interpretation of the pretrial order adopted by the New Jersey Supreme Court. Jenkins v. Devine Foods Inc., 3 N.J. 450, 457, 70 A.2d 736, 739 (1950). The interpretation of the trial judge, though somewhat broader, likewise did not include the plaintiff's claim that the memoranda were payable in cash. Transcript of Record, pp. 12, 95, 99, Jenkins v. Devine Foods Inc., *supra*.

7. *Id.* at 70.

8. *Id.* at 61. One of the grounds advanced for the defendant's motion for a directed verdict was that the plaintiff had failed to prove that the memoranda were payable in cash. *Id.* at 93. The appellate court disregarded the fact that the defense was conducted primarily to meet plaintiff's new theory.

9. After a full retrial the court ruled that the plaintiff was entitled to the amount of the credit memoranda in cash. Communication to the YALE LAW JOURNAL from Galen B. Hall, counsel for defendant-appellant, Jenkins v. Devine Foods Inc., 3 N.J. 450, 70 A.2d 736 (1950), dated April 21, 1950, in Yale Law Library.

had been waived by his failure to raise it at the pretrial conference. But future litigants were cautioned that variance might thenceforth result in reversal unmitigated by the opportunity for retrial of the new issue.[10]

If the variance had been from pleadings rather than a pretrial order, the New Jersey court might have reached a different conclusion. Rule 3:15–2 of the New Jersey rules, corresponding to rule 15b of the federal rules, provides that the pleadings shall be "treated as amended" when an issue has been litigated by consent.[11] The requisite consent is usually found in the

10. The court was not clear, in threatening to deny retrial, that it meant to foreclose only the issues improperly tried and not the issues originally stated in the order. The court's failure to make provision for retrial of the original claim may have been due to its interpreting plaintiff's complete change to a new theory as a surrender of his original claim, thus obviating the need for retrial of that claim. But a litigant may abandon an old claim only because he is permitted to proceed on a new theory. Reversal therefore may result in a more serious penalty to the party whose case is based on a variance than the rules authorizing denial of amendment contemplated. By contrast the trial court's denial of amendment does not preclude judgment on the issues already stated in the pretrial order. Such denial may frequently mean no more than the elimination of an expendable afterthought. And even if the litigant is permitted retrial of the old claim, he may have made damaging admissions in the former trial which are admissible against him at the subsequent trial.

In two later New Jersey cases where the original and varying claims were both litigated, the court permitted retrial of both by explicitly authorizing new pretrial orders. Possibly the court decided to abandon the threat made in the *Jenkins* case. Or perhaps it did not want to carry out the *Jenkins* threat until it had before it a case which had been tried after the *Jenkins* ruling had come down. Nevertheless, by reversing in both cases, the court did affirm its belief that the efficiency of pretrial procedure, even in its primordial stages, requires some kind of penalty for variance. Anderson v. Modica, 73 A.2d 49 (1950); Mead v. Wiley Methodist Episcopal Church, 4 N.J. 200, 72 A.2d 183 (1950).

11. The New Jersey rule provides that "When issues not raised by the pleadings are tried by consent or without objection of the parties, they shall be treated in all respects as if they had been raised in the pleadings." RULES GOVERNING THE COURTS OF NEW JERSEY 3:15-2. The federal rule is the same except that it substitutes "express or implied consent" for "consent or without objection." FED. R. CIV. P. 15 (b).

Earlier drafts of the federal rules did not require consent in order to bring litigated issues within the pleadings. They went even further, requiring an affirmative showing of prejudice before evidence could be excluded as irrelevant. Thus, in effect, the opportunity to litigate the issue would have been sufficient to dispel the threat of variance. Advisory Committee on Rules for Civil Procedure, Rule 19b, *Tentative Draft II*, II PREPARATORY PAPERS, DRAFTS, REPORTS AND CORRESPONDENCE, USED IN THE PREPARATION OF THE RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES in Yale Law Library (1934–39); Rule 23b, *Tentative Draft III*, *id.* vol. III; Rule 22b, *Preliminary Draft I*, *id.* vol. IV; letter from Dean Clark to Major Tolman, dated October 19, 1937, *id.* vol. XXIII. The objections of judges and bar associations compelled the changed emphasis from the litigation of the issue to its litigation by consent. Edward H. Hammond, *Speech before the Seventh Annual Judicial Conference of the Fourth Circuit, June, 1937 id.* vol. XXIII, p. 7 of speech; The Committee on Federal Practice and Procedure of the Federal Bar Association of New York, New Jersey and Connecticut, *Report on the Advisory Committee's Preliminary Draft of the Rules of Civil Procedure*, *id.* vol. XIII, pp. 11–12 of *Report*.

See Wells, *Implied Consent Under the New Federal Rules*, 13 FLA. L.J. 18 (1939); Commentary, *Trial of Issues by Implied Consent*, 3 FED. RULES SERV. 15b.1 (1940).

failure to make timely objection to the introduction of irrelevant evidence.[12] And consent may also be found where evidence was admitted over valid objection if the new issue was nonetheless litigated by the objecting party.[13]

There is of course a significant difference in the purpose of the pleadings and of the pretrial conference, and this difference is recognized in the rules regulating their respective amendment in the trial court. The purpose of pleadings under modern rules is to set the judicial machinery working on the controversy, to set its bounds in a general way, and to inform the parties what events in their lives are being made the subject of litigation.[14] Because they are not expected to give a detailed forecast of the course of the trial, pleadings may be amended under the New Jersey and federal rules whenever the merits of the controversy will be better presented thereby, provided only that the adverse party is not prejudiced.[15] The pretrial confer-

12. See, *e.g.* Shapiro v. Yellow Cab Co., 79 F. Supp. 348 (E.D. Pa. 1948); and Charles E. Clark, PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES AT CLEVELAND, OHIO 255 (1938), "The rule [15b] is designed to provide that when there has been a fair trial on the merits, you can't go back and say, that simply because the matter wasn't spelled out in detail in the pleadings, it is, therefore, invalid."

13. "Consent" is just as fictional when it is found in the oversight of counsel in failing to object as it is when implied from the litigation of the issue. The purpose of the "treated as amended" rule—to validate judgments based on a fair trial of the merits, see note 12 *supra*—is most effectively served when the rule is applied whenever issues are litigated. Rabenovets v. Crossland Consolidated Home Equipment Corp., 137 F.2d 675 (D.C. Cir. 1943) (holding that it was not error to admit evidence after valid objection because objecting party could have asked for a continuance if surprised); *see*, Federal Deposit Insurance Corp. v. Siraco, 174 F.2d 360, 363 (2nd Cir. 1949) (dictum that evidence admitted over valid objection can be used in deciding the case if the issue raised has been litigated). *But cf.* Rosenberg v. Hano, 39 F. Supp. 714 (E.D. Pa. 1940), *aff'd*, 121 F.2d 818 (3rd Cir. 1941).

The provision in federal rule 15b permitting formal amendment of the pleadings before or after judgment to "conform to the evidence" achieves the same result. Fidelity & Deposit Co. of Maryland v. Kront, 157 F.2d 912 (2nd Cir. 1946) (amendment to conform pleadings to evidence admitted over valid objection, *held*, not error because issues had been litigated and offer of continuance had been made).

Even in those cases in which the consent is found in the failure to make timely objection, the courts invariably support their decisions by referring to the actual litigation of the controversy rather than conjuring up consent from an equally fictitious waiver imposed for slothful attention at the trial. See, *e.g.*, Vernon Lumber Corp. v. Harcen Construction Co., 155 F.2d 348 (2nd Cir. 1946); Balabanoff v. Kellogg, 118 F.2d 597 (9th Cir. 1941).

Courts are usually cautious about finding that issues not in the pleadings have been litigated. Their determinations are generally based on a careful review of the record. Du Pont DeNemours & Co. v. Martin, 174 F.2d 602 (6th Cir. 1949); Federal Deposit Insurance Corp. v. Siraco, 174 F.2d 360 (2nd Cir. 1949).

14. Charles E. Clark, PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES AT WASHINGTON D. C. AND OF THE SYMPOSIUM AT NEW YORK CITY 41 (1939); Pike and Willis, *The New Federal Deposition-Discovery Procedure*, 38 COL. L. REV. 1179 (1938); Sunderland, *The New Federal Rules*, 45 W. VA. L.Q. 5, 10 (1938).

15. The federal and New Jersey rules are exactly the same. FED. R. CIV. P. 15(b); RULES GOVERNING THE COURTS OF NEW JERSEY 3:15–2. See, *e.g.*, Watson v. Cannon Shoe

ence, on the other hand, is designed to limit the scope of the trial.[16] It eliminates unnecessary proof through agreements providing for the concession of issues [17] and for limitations on the number, type, and admissibility of exhibits and testimony.[18] By determining in detail what issues will arise at trial, it avoids continuances, which are necessary when unexpected and prejudicial issues are injected.[19] To achieve these purposes counsel must come to the conference prepared to make a full disclosure of the claims and defenses they expect to raise at trial.[20] In order to compel that cooperation,

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Co., 165 F.2d 311 (5th Cir. 1948) (denial of amendment held error; it should have been granted with a continuance to the objecting party if necessary).

As regards amendments before trial, which are covered by Rule 15a of the federal rules and 3:15-1 of the New Jersey rules, there is more difference of opinion as to the discretion allowed the trial court. The rules provide that amendments "shall be freely" allowed "when justice so requires." To some courts "justice" requires a showing of due diligence. Frank Adam Electric Co. v. Westinghouse Electric & Mfg. Co., 146 F.2d 165 (8th Cir. 1945); Schick v. Finch, 8 FED. RULES SERV. 15a.3 Case 1 (S.D. N.Y. 1944). *But cf.* Armstrong Cork Co. v. Patterson-Sargent Co., 14 FED. RULES SERV. 15a212 Case 1 (N.D. Ohio 1950) for the view that diligence is no longer required.

16. Pretrial procedure is expected to take over the function of defining the issues for trial from the pleadings and the motions addressed to the pleadings. Surface v. Safeway Stores, Inc., 7 F.R.D. 478 (D. Neb. 1947) (motion to strike items of damage from complaint as immaterial denied and pretrial conference ordered to determine status of damage claims); F. E. Myers & Bros. Co. v. Goulds Pumps, Inc., 7 F.R.D. 416 (W.D. N.Y. 1947) (motion to limit charges of patent infringements denied and pretrial conference ordered for that purpose); Walling v. Bay State Dredging & Contracting Co., 3 F.R.D. 241 (D. Mass. 1942) (motion for bill of particulars denied because the information requested was unnecessary for responsive pleading and pretrial conference is the appropriate device for narrowing the issues).

It has been suggested that pretrial may supplant written pleadings altogether. Pike, *supra* note 1, at 72. For the view that pleadings never were very effective in determining the issues in a case, see Sunderland, *The New Federal Rules*, 45 W. VA. L.Q. 5, 17 (1938).

17. Fowler v. Crown Zellerbach Corp., 163 F.2d 773 (9th Cir. 1947) (items of damage limited to depreciation and loss of income); Baker v. Lagaly, 144 F.2d 344 (10th Cir. 1944) (agreement that if defendant were liable, $450 was a reasonable charge for funeral expenses); McDowall v. Orr Felt & Blanket Co., 146 F.2d 136 (6th Cir. 1944) (agreement that three of four contracts sued on were void for lack of mutuality); Daitz Flying Corp. v. United States, 3 F.R.D. 372 (E.D. N.Y. 1945) (agreement that there were no issues of fact).

18. United States v. 12,800 Acres of Land in Hall County, Neb., 69 F. Supp. 767 (D. Neb. 1947) (agreement that deeds were acknowledged, witnessed and delivered and therefore valid); Gotz v. Universal Products Co. Inc., 3 F.R.D. 153 (D. Del. 1943) (type of exhibits necessary should be agreed on at pretrial conference to avoid excessive costs to losing party); Federal Deposit Insurance Corp. v. Fruit Growers Service Co., 2 F.R.D. 131 (E.D. Wash. 1941) (number of experts limited to three on each side); Brief for Appellant, p. 35a, Jenkins v. Devine Foods Inc., 3 N.J. 450, 70 A.2d 736 (1950) (agreement that "all exhibits referred to in the pleadings may be admitted without formal proof").

19. Continuances seriously upset trial calendars, making for uncertainty as to when a particular case will be tried, and subjecting counsel either to sudden calls to appear for trial or to protracted delays. See McCarthy v. Lerner Stores Corp., 9 F.R.D. 31 (D. D.C. 1949); Ashley v. Atlas Mfg. Co., 9 FED. RULES SERV. 16.32 Case 2 (D. D.C. 1946); NEW YORK LAW SOCIETY, A PROPOSAL FOR MINIMIZING CALENDAR DELAY IN JURY CASES 5 (1936).

20. See McCarthy v. Lerner Stores Corp., 9 F.R.D. 31 (D. D.C. 1949); King v. Edward

amendment of the pretrial order will be permitted only in unusual circumstances.

But the distinction between amending pleadings and amending a pretrial order has little relevance to the application of the "treated as amended" doctrine in the appellate court. Whether that doctrine is to be applied to the pretrial order on appeal should depend first on whether the policy behind excluding the new issues in the trial court is advanced when the appellate court reverses for their improper admission. By this test reversal is not an effective sanction to compel cooperation at the pretrial conference.[21] For preparation and disclosure are insured primarily by fear that the undisclosed issue will not be admitted at trial, not fear that it will be admitted and disallowed on appeal. The possibility of reversal is an effective sanction only to the extent that a lawyer relies on the errors of the trial judge to enable him to raise new issues.

Nor is reversal a desirable technique to compel the trial judge to adopt a stricter policy towards the admission of new issues. Reversal is proper only where one of the parties has been prejudiced by the too hasty admission of a new issue. Where, as in the *Jenkins* case, variance at the trial has not prejudiced anyone, reversal is a wasteful device which has been discarded by the "harmless error" doctrine.[22] Strongly worded dicta plainly labelling

Hines Lumber Co., 8 FED. RULES SERV. 16.32 Case 3 (D. Ore. 1945); Delehant, *supra* note 1, at 18; Laws, *Pre-Trial Procedure—A Modern Method of Improving Trials of Law Suits*, 25 N.Y.U.L. Q. REV. 17, 19 (1950).

21. It has been suggested that the imposition of costs would be a more appropriate device for compelling cooperation at the pretrial conference. Thus, rather than foreclosing an extraneous issue altogether, the party seeking to inject it would have to bear the entire cost of its litigation. Costs could also be imposed when an issue within the order is litigated unnecessarily. REPORT OF THE ROYAL COMMISSION ON THE DESPATCH OF BUSINESS AT COMMON LAW 79–81 (1936); Sunderland, *supra* note 1, at 215, 226. See Watson v. Cannon Shoe Co., 165 F.2d 311 (5th Cir. 1948) (trial court held in error for not permitting amendment to pleadings; it could have imposed costs as penalty for raising issue too late); Geopulos v. Mandes, 4 FED. RULES SERV. 16.33 Case 1 (D. D.C. 1940) (amendment of pretrial order permitted, but movant must bear costs if defense fails). But see Charles E. Clark, PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES AT WASHINGTON D.C. AND OF THE SYMPOSIUM AT NEW YORK CITY 40 (1939): "Minor penalties, such as . . . costs . . . really amount to nothing as a deterrent or corrective" and "The only penalty that counts . . . is the loss of your case."

22. A harmless error provision is part of both the federal and New Jersey rules. FED. R. CIV. P. 61; RULES GOVERNING THE COURTS OF NEW JERSEY 3:61. The New Jersey rule provides that, "Neither error in the admission or exclusion of evidence, nor error in any ruling or order or in any action taken or omitted by the court or by any of the parties, nor any other matter, whether or not involving the exercise of discretion, shall constitute ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless denial of the relief sought appears to the court to be inconsistent with substantial justice. The court at every stage of a case shall disregard any error or defect which does not affect the substantial rights of the parties." The federal rule is substantially the same.

That this means provisions in the rules of procedure are merely hortatory until a violation of them causes a substantial injustice was recognized when the rules were drawn up.

the trial court's action "harmless *error*" may be equally effective in instructing trial courts in pretrial practice. And the appellate court's rule-making powers,[23] as well as the work of judicial councils and conferences, are also available.[24]

Not only is reversal an ineffective sanction for parties and an undesirable sanction for judges, but the appellate court is poorly qualified to determine whether or not there actually was noncooperation at the pretrial conference. Provisions permitting amendment of the pretrial order recognize that new issues may arise despite full pretrial disclosure.[25] New evidence and valuable afterthoughts may not reveal themselves until the conference is over. And surprises such as the lapses or recollections of witnesses may appear at the trial despite any preliminary discussion among lawyers.[26] The determination of whether there was good faith participation in the pretrial conference is best made by the trial judge, who frequently will have presided at the pretrial conference.[27] He can observe changes in testimony at trial and see

Charles E. Clark, PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES AT WASHINGTON D.C. AND OF THE SYMPOSIUM AT NEW YORK CITY 48 (1939). See also Haskins v. Roseberry, 119 F. 2d 803 (9th Cir. 1941) (denying reversal when no harm resulted from violation of the rule prescribing that the Statute of Limitations be pleaded affirmatively); Sunderland, *The Problem of Appellate Review*, 5 TEX. L. REV. 126, 148 (1927).

23. The New Jersey Supreme Court has very wide authority under the 1948 Constitution to establish rules for all courts in the state. N.J. CONST. Art. 6, § II, par. 3; VANDERBILT, *op. cit. supra* note 1, at 117.

24. For a survey of the use and operation of judicial councils and conferences see VANDERBILT, *op. cit. supra* note 1, at 64; Pirsig, *Judicial Councils*, 4 F.R.D. 22. For an example of how judicial conferences can be used to explain and advertise pretrial procedure, see the program of the Judicial Conference of Senior Circuit Judges in 1944, 4 F.R.D. 35. It included several acted-out demonstrations of pretrial conferences and addresses by Bolitha Laws and Professor Sunderland. Such positive programs have the advantages of completeness and detail which scattered reversals and their fragmentary instructions must necessarily lack.

25. The federal and New Jersey rules provide that the pretrial order can be amended at the trial only to avoid "manifest injustice." FED. R. CIV. P. 16; RULES GOVERNING THE COURTS OF NEW JERSEY 3:16. See Phoenix Mutual Life Ins. Co. v. Flynn, 171 F.2d 982 (D.C. Cir. 1948) (satisfactory showing of "manifest injustice"); McCarthy v. Lerner Stores Corp., 9 F.R.D. 31 (D. D.C. 1949) (dictum that amendment of the pretrial order will be permitted "only in exceptional cases"). Amendment of the pleadings after the entry of a pretrial order raises the same problem. McDowall v. Orr Felt & Blanket Co., 146 F.2d 136 (6th Cir. 1944) (amendment permitted in view of counsel's good faith).

26. Trials seldom progress as counsel expect and frequently are decided on bases that were completely unforeseen. The parties to a suit "know exactly what they are fighting about when the writ is issued, but find themselves fighting a very different case when the trial is actually launched. It is a wise litigant who knows his own quarrel when he sees it in court." Judge Eggleston, quoted in FRANK, COURTS ON TRIAL 87 (1949). See *Id.* ch. 1, VI; Laws, *Pre-Trial Procedure—A Modern Method of Improving Law Suits*, 25 N.Y.U.L.REV. 16, 19 (1950).

27. In thirteen states the judge who presides at the conference also presides at trial. In four states a different judge presides at trial and in nine states there is no general practice. VANDERBILT, *op. cit. supra* note 1, at 212. In large and busy jurisdictions such as New York City and Washington, D. C., there are separate dockets for trial and pretrial with the result

examination dispose of old defenses and impose new liabilities. He is in the best position to judge the surprise or earnestness of counsel at the moment the new issue arises, to appraise its importance to the parties' claims, and to determine whether a continuance will be necessary.[28] If the trial judge is willing to allow a party to introduce a new theory, the appellate court should be exceedingly reluctant to find on its own that the party was non-cooperative at the pretrial conference.

The decision in the *Jenkins* case was based in part on the fact that the new issue had been admitted through the trial court's deliberate sanction of variance from rather than amendment of the pretrial order.[29] The court may have felt that the considerations which should govern the admission of new issues are properly evaluated only when the more formal step is taken. But the difference between variance and amendment may be no more than the language used in disposing of the objection to the evidence. The trial judge can express his decision to admit a "new" issue by interpreting the pretrial order broadly enough to include the new matter or by admitting it despite the order—thus creating a variance—, or else by approving or even suggesting amendment of the order. The choice of method may be motivated by what the court considers the speediest way of dispatching an unmeritorious objection, rather than any misconception of the function of the pretrial conference. At least if there is any such misconception it will pervade all the means by which new issues can be admitted. The appellate court's function of preventing trial courts from taking too lax a view toward pretrial order is best served by supervising the standards employed by the trial judge, not by prescribing the form to be used in admitting the new issue.

The *Jenkins* decision threatens to impose an unduly harsh penalty on those litigants who are blameless for the improper framing of issues at the pretrial conference or who have neglected to follow strict procedural ritual. This severity is not necessary for the efficient operation of pretrial practice. Effective pretrial procedure does require a strict policy in the trial court towards issues outside the order. But at the appellate level, the "treated as

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that the same judge seldom presides at both. Aside from its greater efficiency, there is some feeling that this division is desirable because it avoids the possibility that a judge who has become prejudiced by an attorney's unwillingness to settle at the conference will preside at the trial of his case. *Pretrial Procedure and Administration*, THIRD ANNUAL REPORT OF THE JUDICIAL COUNCIL OF NEW YORK 10 (1937); *Pre-Trial Procedure in the Wayne County Circuit Court Detroit, Michigan, supra* note 1, at 63.

28. An additional consideration is the timeliness of the objection to the new issue. A possible plan that trial courts might use in balancing the need to compel cooperation at the conference with the desire to do justice would be as follows: where the new issue requires a continuance, its proponent should have the burden of showing good faith participation in the conference, and substantiality of the new issue before it is admitted and the trial disrupted. Where the new issue does not require a continuance, the court should admit it unless affirmatively satisfied that the issue is unsubstantial and that its proponent willfully failed to cooperate at the pretrial conference.

29. Jenkins v. Devine Foods Inc., 3 N.J. 450, 457, 458, 70 A. 2d 736, 739, 740 (1950)